S.B. Civil Misc. Appeal No.714/2005

Smt. Basrin and others

vs.

Legal heirs of Smt. Shantidevi and others.

Date : 7.9.2005

HON'BLE MR. PRAKASH TATIA, J.

Mr. VK Mathur, for the appellants.

Mr. Suresh Srimali, for the caveators/respondents no.1 to 6 & 11 to 20.

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Heard learned counsel for the parties.

The appellant is aggrieved against the order dated 18.5.2005 by which the Additional District Judge (Fast Track) No.2, Bhilwara rejected the appellants' application for grant of injunction for whole of the property. The trial court, however, allowed the application for land marked in the Commissioner's report as IJLM on the ground that Peeru Khan is in possession of the said portion of the land.

Brief facts of the case are that the plaintiffs/appellants no.1 to 6 – descendants of Peeru Khan, in the life time of Peeru Khan, with plaintiff no.7 – son of Mehtab Khan, who is alleged to be son of the purchaser of the property from Peeru Khan vide registered sale deed dated 16.9.1952, have filed this suit against the defendants by impleading Peeru Khan also as party defendant. In the plaint, the appellants pleaded that as

per the law (Muslim Law) applicable to the appellants, the share in the property can be sold out by co-sharer with the consent of other co-sharers only. If the share in the property is sold without consent of co-sharers, then the sale is void. According to the plaintiffs, Peeru Khan sold 1.12 bighas of land vide registered sale deed dated 16.9.1952 to Mehtab Khan. This sale was with the consent of all the co-sharers and is, therefore, a valid sale deed. However, the plaintiffs pleaded that though the property was sold to Mehtab Khan by registered sale deed but Mehtab Khan allowed the plaintiffs no.1 to 6 to continue with possession and, therefore, they are in possession of the property.

According to the plaintiffs, the respondents got executed a power of attorney in the name of one Sampat Bohra which is dated 21.4.1994 and as power of attorney, said Sampat Bohra sold part of the property on 13.9.1994 to the defendants no.1 to 6 and Araji No.6 to Shanker Mali on 22.9.1995. The plaintiffs challenged the power of attorney as well as sale deeds in the suit. The plaintiffs prayed that the respondents may be restrained from alienating the property and they be further restrained from altering position of the land in dispute. The plaintiffs also stated that any amount deposited in the name of Peeru Khan for converting the land in question was with intention to grab the property of the plaintiffs and, therefore, any order which is passed by any authority converting the land is illegal and ineffective against the interest of the plaintiffs.

The respondents/non-applicants no.1 to 6 and 12 to 20 submitted that the land in question was recorded in the name of Peeru Khan and in the life time of Peeru Khan, his descendants cannot have any right in the property. The defendants also challenged the sale deed dated 16.9.1952 on the ground that the same was got executed to save the property from the hands of some mortgagee Jamna Lal s/o Kashi Ram. According to the non-applicants, admittedly, the possession of the property was not given to the alleged purchaser Mehtab Khan in pursuance of the sale deed dated 16.9.1952 is an admitted fact which supports the contention of the non-applicants about the reason for execution of the sale deed dated 16.9.1952. The non-applicants also submitted that they are in possession of the property. The land has already been converted by the order of the competent authority dated 23.2.1956 and the objection of Peeru Khan was rejected by the said authority on 7.3.1998. There are very many other objections raised by non-applicants in the reply.

In the trial court, the Urban Improvement Trust as well as Peeru Khan, seller of the property in the year 1952 and father of plaintiffs no.1 to 6, also filed the reply to the injunction application. A reply was also filed by the non-applicant no.7 to 10 and 21 separately.

The trial court appointed the Commissioner to inspect the site on 23.10.2004 and submitted report. The trial court held that the circumstances in which the sale deed dated 16.9.1952 is alleged to have been executed, appears

to be suspicious because of the reason that there are omission of mentioning very many facts in the sale deed dated 16.9.1952 like earlier mortgage. The trial court also examined the allegation of the plaintiffs about improbability of executing the power of attorney in favour of Sampat Bohra by Peeru Khan as power of attorney was admittedly executed at a place where the said Peeru Khan was not residing etc. The trial court also considered the Commissioner's report and the affidavits filed by the parties and reached to the conclusion that since the trial court found Peeru Khan in possession of a plot of land comprised in plots no.38 and 39 and which has been marked as 'IJLM' and, therefore, merely on the basis of said possession, the plaintiffs are entitled to relief for injunction for that property. The trial court after consideration of facts of the case rejected the prayer of the plaintiffs for relief of grant of injunction for rest of the land. Hence, this appeal.

I have considered the submissions of learned counsel for the parties and have perused the record.

According to the learned counsel for the appellants, the trial court has decided the application for temporary injunction as though the trial court has decided the suit itself. It is also submitted that when the property was sold in the year 1952 by Peeru Khan, then the sale of same property by the power of attorney of said Peeru Khan is of no consequence. It is also submitted that the appellants

are in possession of the property and, therefore, the trial court should not have dismissed the application for temporary injunction so as to permit the defendants to continue with the construction over the property.

The argument of the learned counsel for the appellant may appear to be quite attractive in a case where only plea of preserving the property during the course of litigation is concerned, is looked into. But here in this case, some serious questions came on the record which itself are sufficient to hold that the court below was right in rejecting the appellants' application for grant of injunction. Prima-facie the reasons given by the trial court about the manner in which the sale deed dated 16.9.1952 was executed raises serious doubt about the claim of the appellants. The appellants' admitted case is that the sale deed was executed on 16.9.1952 by Peeru Khan but possession of the property was not given to the purchaser Mehtab Khan even after more than 50 years. That is one of the reason to doubt the sale deed. Peeru Khan himself did not challenge the sale deed dated 16.9.1952 or the subsequent sale deeds executed by Sampat Bohra as power of attorney and for the reasons best known to him. He did not join the plaintiffs who are none else than his own daughters and wife. Not only this, but one son of alleged purchaser Mehtab Khan has also been impleaded as plaintiffs along with the descendants of Peeru Khan. Therefore, it is admitted case of the descendants of Mehtab Khan that the possession of the property was not delivered to the

purchaser in the year 1952 and the present suit has been filed in the year 2004 and the stand in the plaint of the plaintiffs is that Peeru Khan and his descendants are in possession of the property, therefore, despite the sale deed of the year 1952, according to the plaintiffs themselves, the possession of the seller is continuing. The trial court also examined the facts that the sale deeds were executed in the year 1994, 10 years before the filing of the present suit. The land has already been converted by the orders of the competent authorities into abadi land from agriculture land and that order of conversion has not been challenged except raising objection before the land conversion officer which was rejected. Be it as it may be. Peeru Khan still has not raised any objection about raising of construction by the purchaser of the property as he is not plaintiff in the suit. Apart from it, in view of the Commissioner's report and the documents placed on record, the possession of the property appears to be that the purchaser who are having lawful orders with them and, therefore, if the trial court has not found prima-facie case in favour of the plaintiffs, the trial court has not committed any illegality.

So far as the apprehension of the learned counsel for the appellant that the trial court has decided the application under Order 39 Rules 1 and 2 CPC as if it has decided the suit itself is concerned, the apprehension has no legal foundation in view of the fact that even if it is not mentioned in the order under Order 39 Rules 1 and 2 CPC

or even by order of the appellate court that the finding recorded by the court is prima-facie, still they remains the prima-facie findings only and they cannot affect any party adversely in the main suit. To clarify, it is made clear that all observations made by the trial court in its impugned order dated 18.5.2005 as well as by this Court are the prima-facie findings on the issue of prima-facie case and the right of the parties and they will not come in the way of any of the parties and the parties will be free to prove their cases according to their own case.

In view of the above discussion, I do not find any merit in this appeal and accordingly, this appeal is dismissed.

(PRAKASH TATIA), J.

S.Phophaliya